



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 8, 2004

Mr. Dan Junell
Assistant General Counsel
Teacher Retirement System of Texas
1000 Red River Street
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OR2004-9504

Dear Mr. Junell:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 212450.

The Teacher Retirement System of Texas (the "system") received three requests for information relating to RFP #0929039FDP and the administration of health reimbursement accounts for public school employees. You state that some responsive information has been released to the requestors. You claim that release of portions of the submitted information may implicate the proprietary interests of a third party under sections 552.101 and 552.110 of the Government Code, although you take no position as to whether the information is so excepted. You state, and provide documentation showing, that you notified thirteen interested third parties of the request and of each company's right to submit arguments to this office as to why the information pertaining to it should not be released.¹ See Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party

¹The interested third parties notified pursuant to section 552.305 are the following: Aetna Life Insurance Company ("Aetna"); Amisys Synertech, Inc. ("Amisys"); Central Trust Bank ("CTB"); Conexis Benefits Administrators, L.P., d/b/a Complink ("Conexis"); CBCA Administrator, Inc. ("CBCA"); First Data Resources, Inc. ("First Data"); FlexBen Corporation ("FlexBen"); Fringe Benefits Management Company ("Fringe Benefits"); Hewitt Associates ("Hewitt"); Payflex Systems USA, Inc. ("Payflex"); MediView; and SHPS, Inc. ("SHPS").

to raise and explain applicability of exception to disclosure under Act in certain circumstances). We have reviewed the submitted information.

As a preliminary matter, we note that this office previously ruled on the public availability of a portion of the requested information in Open Records Letter No. 2004-9037 (2004). Pursuant to that ruling, the system was required to release the responsive information. You do not indicate that the relevant facts and circumstances have changed since the issuance of the prior ruling. Accordingly, to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter No. 2004-9037, we determine the system must continue to follow that ruling as a previous determination with respect to such information. *See* Open Records Decision No. 673 (2001) (governmental body may rely on previous determination when 1) records or information at issue are precisely same records or information previously submitted to this office pursuant to section 552.301(e)(1)(D); 2) governmental body which received request for records or information is same governmental body that previously requested and received ruling from attorney general; 3) prior ruling concluded that precise records or information are or are not excepted from disclosure under Act; and 4) law, facts, and circumstances on which prior ruling was based have not changed since issuance of ruling). Consequently, this ruling only addresses the submitted information to the extent such information is not identical to the information at issue in Open Records Letter No. 2004-9037.

We note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, Amisys, Central Bank, CBCA, FlexBen, Fringe Benefits, Hewitt, Payflex, and MediView have not submitted any comments to this office explaining how release of the requested information would affect their proprietary interests. Therefore, these companies have provided us with no basis to conclude that they have protected proprietary interests in any of the submitted information. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 639 at 4 (1996), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, information pertaining to these companies may not be withheld from disclosure under section 552.110 of the Government Code.

Conexis claims that some of its information is excepted from disclosure under section 552.101 of the Government Code, which excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Although Conexis raises section 552.101, it does not provide any arguments to demonstrate that the information it seeks to withhold is confidential by law. Additionally, we are not aware of

any provision of law that makes this information confidential. Therefore, the system may not withhold any information pertaining to Conexis under section 552.101.

SHPS asserts that information pertaining to it is excepted from public disclosure under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is not designed to protect the interests of private parties that submit information to a governmental body. *See id.* at 8-9. The system does not argue that the release of any of the submitted information would harm the system's interests in a particular competitive situation. Therefore, no portion of the submitted information pertaining to SHPS is excepted from disclosure under section 552.104 of the Government Code.

First Data asserts that information related to its computer network and data processing security are excepted from public disclosure under section 552.139 of the Government Code, which provides as follows:

(a) Information is excepted from the requirements of Section 552.021 if it is information that relates to computer network security or to the design, operation, or defense of a computer network.

(b) The following information is confidential:

(1) a computer network vulnerability report; and

(2) any other assessment of the extent to which data processing operations, a computer, or a computer program, network, system, or software of a governmental body or of a contractor of a governmental body is vulnerable to unauthorized access or harm, including an assessment of the extent to which the governmental body's or contractor's electronically stored information is vulnerable to alteration, damage, or erasure.

Gov't Code § 552.139. First Data states that its information, provided to the system as attachments to Aetna's response, "address security measures put in place by [First Data], including its disaster recovery abilities and internal controls for its bank card processing system." First Data asserts that the information at issue consists of "a report on computer network vulnerability" and is an assessment of its network's vulnerability to unauthorized access or harm. We find that the submitted records related to First Data constitute an assessment as contemplated by section 552.139(b). Accordingly, the information we have marked must be withheld under section 552.139 of the Government Code.

Aetna, Conexis, First Data, and SHPS have each submitted comments contending that portions of their information are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 of the Government Code protects: (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See* Gov't Code § 552.110(a), (b).

Section 552.110(a) protects the property interests of private parties by excepting from disclosure trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *See* Gov't Code § 552.110(a). A "trade secret"

may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives [one] an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business, as for example the amount or other terms of a secret bid for a contract or the salary of certain employees. . . . A trade secret is a process or device for continuous use in the operation of the business. Generally it relates to the production of goods, as for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958); Open Records Decision Nos. 255 (1980), 232 (1979), 217 (1978).

There are six factors to be assessed in determining whether information qualifies as a trade secret:

- (1) the extent to which the information is known outside of [the company's] business;
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;

(5) the amount of effort or money expended by [the company] in developing this information; and

(6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 232 (1979). This office must accept a claim that information subject to the Act is excepted as a trade secret if a *prima facie* case for exemption is made and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990). However, we cannot conclude that section 552.110(a) is applicable unless it has been shown that the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim. Open Records Decision No. 402 (1983).

Section 552.110(b) protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Upon review of the submitted information and the arguments submitted by Aetna, Conexis, and SHPS, we find that each has made a *prima facie* case that portions of the information that each company seeks to withhold are protected as trade secrets. Moreover, we have received no arguments that would rebut these claims as a matter of law. Thus, we have marked the portions of the information at issue that the system must withhold pursuant to section 552.110(a).

We find that Aetna has made specific factual or evidentiary showings that the release of some of the information it seeks to withhold would cause the company substantial competitive harm. This information, which we have marked, must be withheld pursuant to section 552.110(b). We note, however, that the pricing information of a winning bidder is generally not excepted under section 552.110(b). *See* Open Records Decision No. 514 (1988) (public has interest in knowing prices charged by government contractors). *See generally* Freedom of Information Act Guide & Privacy Act Overview, 219 (2000) (federal cases applying analogous Freedom of Information Act reasoning that disclosure of prices charged government is a cost of doing business with government). Moreover, we believe the public has a strong interest in the release of prices in government contract awards. *See* Open Records Decision No. 494 (1988) (requiring balancing of public interest in disclosure with competitive injury to company). Further, we find that Aetna, Conexis, First Data, and SHPS have not shown that any of the remaining information each seeks to withhold meets the

definition of a trade secret or that its release would cause that company substantial competitive harm. *See* Open Records Decision Nos. 509 at 5 (1988) (because costs, bid specifications, and circumstances would change for future contracts, assertion that release of bid proposal might give competitor unfair advantage on future contracts was entirely too speculative), 319 at 3 (1982) (statutory predecessor to Gov't Code § 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, the remaining information pertaining to these companies may not be withheld pursuant to section 552.110.

We note that First Data and SHPS seek to withhold additional information that the system did not submit to this office for review.² Because such information was not submitted by the governmental body, this ruling does not address that information and is limited to the information submitted as responsive by the system. *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from Attorney General must submit copy of specific information requested).

Insurance policy and check routing numbers contained in the submitted information are excepted from disclosure under section 552.136 of the Government Code, which provides that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. The system must, therefore, withhold the information we have marked under section 552.136.

Lastly, we note that some of the submitted information that is not excepted from disclosure appears to be protected by copyright. A governmental body must allow inspection of copyrighted materials unless an exception to disclosure applies to the information. *See* Attorney General Opinion JM-672 (1987). An officer for public information must comply with the copyright law, however, and is not required to furnish copies of records that are copyrighted. *Id.* If a member of the public wishes to make copies of copyrighted materials, he or she must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 at 8-9 (1990).

In summary, to the extent the information at issue in the present request is identical to the information addressed in Open Records Letter No. 2004-9037, the system must continue to follow that ruling as a previous determination with respect to such information. To the extent the submitted information is not identical to the information at issue in Open Records Letter No. 2004-9037, we have marked the information that the system must withhold under sections 552.110, 552.136, and 552.139 of the Government Code. The remaining submitted

²First Data specifically seeks to withhold pages 134-152 of the independent auditors' report and a disaster recovery exercise; SHPS seeks to withhold numbered pages 65, 69, and 71.

information must be released to the requestors in accordance with applicable copyright law for any information protected by copyright.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

³We note that Conexis and SHPS are requestors, and therefore each has a right to its own information.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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CN/jh

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